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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983, TERM

NO. 83-

DERICK LYNN PETERSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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COMMONWEALTH OF VIRGINIA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Derick Lynn Peterson, prays that a writ of certiorari issue to review a judgment of the Supreme Court of the Commonwealth of Virginia affirming the judgment of the Circuit Court of the City of Hampton convicting him of capital murder and sentencing him to death.

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court, by refusing to respond to the jury's question about the possibility of a life sentence without parole for petitioner's capital murder, thereby restricted the jury's consideration of any factor in mitigation of the death sentence, in violation of Lockett v. Ohio.

2. Whether the trial court, in admitting into evidence during the sentencing phase of petitioner's trial a remark made by a witness for the Commonwealth allegedly made to her by the petitioner at a preliminary hearing on another charge, violated petitioner's Fifth, Eighth and Fourteenth Amendment rights to have the jury fix his sentence in light of clear, ascertainable standards.

3. Whether petitioner was deprived of the rights secured to him by the Fifth, Eighth and Fourteenth Amendments by the

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admission, during the penalty phase of his capital murder trial, of convictions still pending on appeal.

4. Whether the Virginia Supreme Court, in conducting a proportionality review of petitioner's death sentence, unconstitutionally restricts its review to cases in which the death penalty is actually imposed.

II. REFERENCE TO OPINION BELOW

The opinion of the Virginia Supreme Court, affirming petitioner's conviction of capital murder and sentence of death is set out in the Appendix hereto and was rendered April 29, 1983.

III. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Petition is brought to secure to petitioner his rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. Sought to be reviewed is an order dated April 29, 1983, by the Supreme Court of Virginia affirming petitioner's conviction of capital murder and his sentence of death. Review on certiorari is sought pursuant to Rule 17.1.(c) of the Rules of this Court.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES

The petinent constitutional provisions and statutes are set out in the Appendix to this Petition. They are:

A. Amendments V, VIII and XV of the Constitution of the United States.

B. Va. Code §18.2-31(d)(the applicable definition of capital murder).

C. Va. Code §18.2-10(a)(punishment options for capital murder).

D. Va. Code §§19.2-264.2 through 19.2-264.5 (Virginia

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capital sentencing procedure).

E. Va. Code §17-110.1 (review of death sentence by the Supreme Court of Virginia).

V. STATEMENT OF THE CASE

Derick Lynn Peterson, the petitioner, was indicted for capital murder, robbery, and use of a firearm in the commission of a felony as a result of an incident occuring in the City of Hampton on February 7, 1982. The case was tried to a jury in the Circuit Court of the City of Hampton. The evidence developed that approximately 6:00 p.m. Howard Kauffman, an accountant employed by Pantry Pride Grocery Stores, was counting receipts in an office of a store located in Hampton. Dwight Wilson, a cashier employed by Pantry Pride, was at a nearby cash register. He heard a "bang", saw the petitioner pick up a money bag and retreat holding a gun in his hand. Donald Thomas, another employee of Pantry Pride, was standing at the office talking to Kauffman. A man identified as the petitioner ran in, pulled a gun, grabbed a bag of money, shot Kauffman and ran back out (Tr. 73). Jean Sarver was driving her automobile with the intention of shopping at the Pantry Pride store. She testified that a car approached her going very fast and forced her off the road and to a stop in order to avoid a collision. The vehicle was driven by a man she identified as the petitioner (Tr. 89, 90). Robin Barlow, another shopper, saw the petitioner on the outside of the store looking in as she entered and later saw him running out of the store with a gun (Tr. 98-100). Kauffman offered no resistence and was killed when, so the jury believed, a single shot from the weapon being wielded by the petitioner entered his abdomen and severed his iliac artery (Tr. 133). Rescue measures were attempted, but without success, and he was declared dead on

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arrival at the emergency room at Hampton General Hospital. Anthony Conte, the store manager of the Pantry Pride, testified that there was missing after the robbery checks in the amount of $2,025.32 and cash in the amount of $3,979.70 (Tr. 138).

At the conclusion of the guilt phase of the trial, the jury convicted defendant of robbery and sentenced him to life, of use of a firearm and sentenced him to three years, and found him guilty of capital murder (Tr. 214).

During the penalty phase of the trial, the Commonwealth told the court did it did not plan to rely on the heinous, atrocious or vile nature of the crime committed, but would rely instead on "the probability that he (the petitioner) would commit criminal acts of violence that would constitute a continuing serious threat to society" (Tr. 220). Shelia Coffey then testified that the petitioner had robbed a Revco Drug Store at which she was employed using a gun on January 15, 1982. Gerrie Anne Baize testified to a robbery which occurred February 8, 1982 (the day after Kauffman was killed) of a Family Dollar Store in Hampton at which she was employed. She identified petitioner as the robber and recited how a fellow employee, Karen Buchannan, had been shot in the foot, although apparently accidently, during the course of the robbery. Petitioner had been convicted for both robberies and those convictions were awaiting review by the Supreme Court of Virginia at the time of his capital murder trial. Petitioner's convictions which were not yet final at the time they were admitted at his capital murder trial were not objected to by his counsel at trial, but the issue was raised by him in the petition for appeal (petition for appeal p. 17) and was rejected by the Virginia Supreme Court (opinion p. 7). Baize related to the jury that at the preliminary hearing petitioner told her "I will remember you, and I'm going to get you, you mother fucker" (Tr. 235). Baize's testimony was admitted without

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objection, but counsel addressed the issue to the Supreme Court of Virginia (petition for appeal, p. 15). The statement was discussed by the Virginia Supreme Court at pages 8 and 9 of its opinion, during which it declared that the "broad statutory language" of Va. Code §19.2-264.4 permitted introduction of evidence concerning "'the circumstances surrounding the offense, the history and background of the defendant,' as well as mitigating evidence." Sharon Bonville, a probation and parole officer for the Commonwealth of Virginia, testified to petitioner's extensive juvenile record. After deliberating on whether or not petitioner should receive the death sentence or life imprisonment, the two sentencing options for one convicted of capital murder in Virginia, the jury returned with the question whether or not it was possible to give a life sentence without parole. The trial court responded that it was the jury's duty to impose such sentences it considered just and it was not to concern itself with what might thereafter happen (Tr. 261). The court's response was not objected to by petitioner's counsel at the time. However, it was argued to the trial court at the hearing on September 24, 1982 (Transcript, hearing of September 24, 1982, p. 28ff.), and was also addressed in the petition for appeal to the Supreme Court of Virginia, which rejected the claim (Opinion p. 6). While not couched in constitutional terms, this Court's "jurisdiction does not depend on citation to book and verse," Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 875-6, 71 L.Ed.2d 1 fn. 9 (1982). The constitutional import of petitioner's claim is clear. Thereafter, the jury returned, having found that "after consideration of his prior history, there is a probability that he (the petitioner) would commit criminal acts of violence that would constitute a continuing serious threat to society..." and recommended the death sentence.

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On September 24, 1982, the court entered judgments of conviction of the robbery and use of a firearm charges and, with respect to the capital murder, adopted the jury's recommendation that petitioner be electrocuted.

In its opinion (pp. 12-14), the Virginia Supreme Court, in determining whether the petitioner's sentence was "excessive or disproportionate to the penalty imposed in similar cases" reviewed those capital cases it had previously considered by it in which the death penalty had been imposed. Petitioner argued in his petition for appeal that his death sentence was excessive and disproportionate (petition for appeal p. 20). The Virginia Supreme Court rejected his contention. Va. Code §17-110.1 provides that the Virginia Supreme Court will determine whether a sentence of death is excessive or disproportionate to sentences in similar cases even though such an issue is not "enumerated by appeal."

VI. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. THE TRIAL COURT, BY REFUSING TO RESPOND TO THE JURY'S QUESTION ABOUT THE POSSIBILITY OF A LIFE SENTENCE WITHOUT PAROLE FOR PETITIONER'S CAPITAL MURDER, RESTRICTED THE JURY'S CONSIDERATION OF ANY FACTOR IN MITIGATION OF THE DEATH SENTENCE, AS REQUIRED BY LOCKETT v. OHIO.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), this Court concluded that "any aspect of a defendant's character or record and any of the circumstances of the offense" should be considered by the jury as a mitigating factor, 98 S.Ct. at 2964-5. The Virginia Supreme Court has noted that questions by juries regarding parole are very often asked, Hinton v. Commonwealth, 219 Va. 492, 495 (1978). It was Hinton and another case, Clanton v. Commonwealth, 223 Va. 41, 54-5 (1982) which were relied on by the Virginia Supreme Court in upholding the action of the trial court telling the jury that it

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was their duty to sentence the petitioner without regard to what might thereafter happen to him. Hinton did not deal with, and Clanton did not distinguish between, a question about parole in a non-capital case and such a question in a capital case. This Court in Lockett, supra, recognized the obvious, "that the imposition of death by public authority is ...profoundly different from all other penalties." It went on to explain that "(A) variety of flexible techniques--probation, parole, work furloughs, to name a few--and various post-conviction remedies may be available to modify an initial sentence of confinement in non-capital cases." It was in Lockett, too, where this Court advised that " 'possession of the fullest information possible concerning the defendant's life and characteristics' is (highly relevant--if not essential--[to the] selection of an appropriate sentence...'" Lockett, supra at 2964. Before sentencing a man to die, the jury should know--and a defendant has the right that they should know--that, according to the Virginia law as of February 7, 1982, a single life sentence meant that the defendant would not be eligible for parole until after serving fifteen years and that persons convicted of two or more life sentence would not be eligible for parole until after serving twenty years, Va. Code §53.1-151. Given the response of the trial judge, and the frequent public discussion of prisons and parole, the jury might well have believed that by recommending a life sentence on the capital murder conviction, petitioner would be out on the streets in a short time. If they had known he was faced with serving at least twenty years, they might well have opted for life imprisonment.

In Eddings v. Oklahoma, supra, this Court held that a state by statute might not preclude a sentencer from considering any mitigating factor, and neither could the sentencer as a matter of law refuse to consider any relevant mitigating evidence. The

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frequency with which the question of parole arises strongly suggests its importance in the minds of jurors and, therefore, the importance of its being addressed by this Court in the context of the death penalty. Without some explication of the length of time a defendant will realistically serve upon conviction, jurors will, simply because they are not in possession of the information, refuse to take the chance and sentence a defendant to die. If this petitioner had been tried before the court sitting without a jury, the judge would have been familiar with the processes of parole and the length of sentence the petitioner would have served if other than the death sentence had been imposed. Such knowledge, however, the jury does not have and cannot get, and it is because they are forced to speculate that pentitentiary sentences which might be acceptable to them if they knew their duration are foregone in favor of the death penalty they impose only out of fear of the defendant's swift release. In passing, counsel might point out a similar situation arising during the trial of Frank Coppola, who was executed in Virginia in August of last year. There, the jury during the sentencing phase of the trial asked if a life sentence which they were considering imposing for capital murder would run consecutively or concurrently with two life terms plus twenty-one years Coppola had already received at their hands for robbery, maiming and use of a firearm. The trial court's response was similar to the court's in this case. And, as was true in this case, the jury returned with the death sentence, Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979) cert. den., 444 U.S. 1103, 100 S.Ct. 1069, L.Ed.2d 788 (1980).

B. THE TRIAL COURT, IN ADMITTING INTO EVIDENCE A REMARK MADE BY A WITNESS FOR THE COMMONWEALTH ALLEGEDLY MADE TO HER BY THE PETITIONER AT A PRELIMINARY HEARING ON ANOTHER CHARGE, VIOLATED PETITIONER'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT

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RIGHTS TO HAVE THE JURY FIX HIS SENTENCE IN LIGHT OF CLEAR, ASCERTAINABLE STANDARDS.

Va. Code §19.2-264.4 provides that evidence admissible in a sentence proceeding "subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, history and background of the defendant, and any other facts in mitigation of the offense". In petitioner's case, the Virginia Supreme Court construed this statutory language "as broad". That is what it is, and that is its vice. A defendant's prior history includes whatever he has said, thought or done. Every angry word or every error in judgment may be swept up in this language and then utilized against a defendant to prove his dangerous propensities. It may well be assumed that the testimony of Ms. Baize of petitioner's remarks to her at the preliminary hearing of the charge concerning the robbery of the Family Dollar Store was stunning to the jury. There must be, however, some limitation of the aggravating evidence a state may show. If no such limitation exists, we are back to where we were before Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2727, 33 L.Ed.2d 346 (1972), when sentencing was left to the uncontrolled discretion of juries.

In Henry v. Wainwright, 661 F.2d 56, 59 (1981) vacated and remanded on other grounds _____ U.S. _____, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), the Fifth Circuit Court of Appeals concluded

> ...that permitting the jury to consider whatever evidence of non-statutory aggravating circumstances the prosecution might desire to present or the jurors might discern in the testimony opens too wide a door for the influence of arbitrary factors on the sentencing determination. By sanctioning consideration of statutory aggravating factors plus anything else the jury determines to be aggravating, such an instruction broadens jury discretion rather than channels it and obscures any meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not.

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C. PETITIONER WAS DEPRIVED OF THE RIGHTS SECURED TO HIM BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE ADMISSION, DURING THE PENALTY PHASE OF HIS CAPITAL MURDER TRIAL, OF CONVICTIONS STILL PENDING ON APPEAL.

As with the question of parole, the issue of the use of prior convictions which are, at the time of their use, not final assumes a new dimension in a capital sentencing case. The real problem is the obvious one: vindication of his rights in a case other than that in which he has been sentenced to die has precious little significance for a defendant after the death sentence, founded on convictions later overturned, has occurred. Indeed, as the capital sentencing law is interpreted and applied by the Supreme Court of Virginia, it is possible for evidence of crimes with which a defendant has not even been charged or, if he has been charged, of which he may later be found innocent, to be admitted on the ground that such evidence is relevant to the history and background of the defendant or to his propensity for violence.

D. THE VIRGINIA SUPREME COURT, IN CONDUCTING A PROPORTIONALITY REVIEW OF PETITIONER'S DEATH SENTENCE, UNCONSTITUTIONALLY RESTRICTS ITS REVIEW TO CASES IN WHICH THE DEATH PENALTY IS ACTUALLY IMPOSED.

Virginia Code §17-110.1.C.2. provides that in addition to any errors in the trial actually presented to the court on appeal, the court shall consider and determine "(w)hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The opinion of the Virginia Supreme Court rendered in petitioner's case shows that that court, in fulfilling its statutory duty, considered only those cases which had previously been decided in which the death sentence had been imposed. Although life imprisonment is an option for the sentencer in a capital murder case even if the statutory aggravating circumstances are found, the Supreme Court did not review those

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cases in which a defendant, though convicted of capital murder, had received a life sentence. As was said in State v. Bolder, 635 S.W.2d 673, 685 (Mo. 1982), proportionality review is limited to those cases in which the death penalty has been imposed is "unduly slanted." The narrow inquiry conducted by the Virginia Supreme Court is no real inquiry at all. It omits from consideration a great many cases (if, indeed, not the great majority of cases) in which capital murder has been found but life imprisonment imposed. As Justice White said in his concurring in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972), "(t)he death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." The proportionality review conducted by the Virginia Supreme Court does nothing to change that situation.

V. CONCLUSION

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

DERICK LYNN PETERSON

By _____
Of Counsel

VI. CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing to Richard B. Smith, Assistant Attorney General, Criminal Law Enforcement Division, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia, 23219, Counsel for Appellee, this 24th day of June, 1983.

_____
J. Gray Lawrence, Jr.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983, TERM

NO. 83-

DERICK LYNN PETERSON,

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the petitioner, Derick Lynn Peterson, by counsel, and moves this Court for leave to prosecute his Petition for Writ of Certiorari challenging his conviction of capital murder and sentence of death. He attaches hereto, and prays to be read as a part hereof, his Affidavit in support of this Motion.

Because of petitioner's indigency, counsel was appointed to represent him in the Circuit Court of the City of Hampton, where he was convicted of capital murder and sentenced to death. Counsel was also appointed to represent him on appeal of that conviction and sentence to the Virginia Supreme Court.

DERICK LYNN PETERSON

By J. Gray Lawrence, Jr.
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing to Richard B. Smith, Assistant Attorney General, Criminal Law Enforcement Division, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia, 23219, Counsel for Appellee, this 24th day of June, 1983.

J. Gray Lawrence, Jr.

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IN THE SUPREME COURT OF THE UNITED STATES

DERICK LYNN PETERSON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

TERM

Record No.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Derick Lynn Peterson, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on my petition for a writ of certiotari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor and that I believe I am entitled to redress.

I further swear that because of my indigency, counsel was appointed to represent me in the Circuit Court of the City of Hampton, where my trial for capital murder was originally heard, and in the Supreme Court of Virginia, which considered my appeal from my conviction of capital murder and sentence of death.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting my petition for certiorari are true.

1. I am not presently employed. The date of my last employment was prior to June, 1982, and the amount of my salary and wages per month which I received was approximately $1500 after taxes.

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2. Within the last twelve months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or from any other source.

3. I do not own any cash, checking or savings account.

4. I do not own any real estate, stocks, bonds, notes or other valuable property (excluding ordinary household furnishings and clothing), other than an automobile. The automobile is a 1973 Ford LTD, and I have been advised that its approximate value is $200.00.

5. There are no persons who are dependent upon me for support.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Derick Lynn Peterson
Derick Lynn Peterson

SUBSCRIBED AND SWORN to before me this 17 day of, June, 1983.

Notary Public

My Term Of Office Expires:

Nov. 6, 1985

Let the Applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

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Present: Carrico, C.J., Cochran, Poff, Compton, Stephenson, and Russell, JJ., and Harrison, Retired Justice

DERICK LYNN PETERSON

OPINION BY JUSTICE GEORGE M. COCHRAN

-v- Record No. 822136

April 29, 1983

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT FOR THE CITY OF HAMPTON
Nelson T. Overton, Judge

On August 30, 1982, a jury found Derick Lynn Peterson guilty of capital murder in the commission of robbery while armed with a deadly weapon. In the second phase of the bifurcated trial, the jury fixed his punishment at death. The trial court confirmed the conviction and sentenced Peterson in accordance with the verdict. We have consolidated the mandatory review of the death sentence with Peterson's appeal of his conviction and have given the case priority on our docket.. Peterson seeks reversal of his conviction and remand for a new trial, or in the alternative, commutation of his sentence to imprisonment for life.

About 6:00 p.m. on February 7, 1982, Howard Kauffman, an accountant, was counting receipts in the office of a Pantry Pride store. The top portion of the office enclosure was glass and Kauffman could be seen by customers and other employees in the store. Dwight Wilson, a cashier working 22 to 25 feet from the office, testified that he saw Kauffman kick the office door to prevent a man from entering, but the intruder opened the door, went to the upper level of the office, "grabbed a sack of money" from the desk, and came back down. As Kauffman stood facing him, the man, who was undisguised, took out a gun, shot the accountant,

and fled from the premises. Once the robber had entered the office, Kauffman offered no resistance. From photographs and lineups, Wilson subsequently identified Peterson as the assailant.

Wanda Scott, another cashier, saw the intruder forced his way into the office. Kauffman stepped back, but the man shot him, reached for something, and ran from the store. She could not say what the man carried away with him. She identified Peterson as the killer after seeing him in a lineup.

Donald Thomas, another employee, had been talking to Kauffman through the office window before the shooting. He saw a man who had been standing nearby run into the office, seize a money bag lying on the desk, pull a gun, shoot Kauffman, and run from the store. Thomas was about five feet from Kauffman when the shooting occurred. Although Thomas conceded that he had picked two different suspects, one of whom was Peterson, from the first photographs shown to him, he identified Peterson from a photograph of a lineup.

Another witness identified Peterson as the driver of a car running at high speed that forced her automobile to the side of the road as she approached the store immediately after the shooting. Two other customers were in the store when they heard a gunshot. They identified Peterson as the man whom they then saw running away with a gun in his hand. They remembered having seen the same man standing outside before they entered the store.

The medical examiner testified that the cause of Kauffman's death was a bullet wound to the abdomen; the bullet severed the iliac artery. There was evidence that extensive life-saving measures were used without success in an effort to revive him.

After the robbery, it was discovered that a bank money bag and more than $6,000 in cash and checks were missing from the store.

1. The Guilt Trial.

A. Admissibility of Photographs.

During the guilt trial, the Commonwealth offered in evidence as exhibits two color photographs of Kauffman taken after his death, one showing only his face and the other showing the entry wound in his abdomen made by the fatal bullet. The trial court admitted the photographs in evidence over Peterson's objection that, since Kauffman's identity and the cause of his death were not challenged, the photographs were unnecessary and could only be used to inflame the jury.

The admission in evidence of photographs of a murder victim's body is within the discretion of the trial court. Whitley v. Commonwealth, 223 Va. 66, 74-75, 286 S.E.2d 162, 167, cert. denied, 459 U.S. (1982); Waye v. Commonwealth, 219 Va. 683, 692, 251 S.E.2d 202, 207-08, cert. denied, 442 U.S. 924 (1979); Evans v. Commonwealth, 215 Va. 609, 614, 212 S.E.2d 268, 272 (1975); Brown v. Commonwealth, 212 Va. 515, 518-19, 184 S.E.2d 786, 788-89 (1971), vacated in part on other grounds and remanded, 408 U.S. 940 (1972).

We held in Clanton v. Commonwealth, 223 Va. 41, 51, 286 S.E.2d 172, 177 (1982), that a "defendant ... may not preclude the Commonwealth from introducing photographs by offering to stipulate facts shown in the photographs." In the present case, there is not even evidence of an offer to stipulate facts shown in the photographs.

The Commonwealth had the burden of proving, inter alia, that the killing was willful, deliberate, and premeditated. The location of the entry wound might tend to support an inference that the killer did not shoot wildly in panic but drew his weapon and took aim before firing. There were only two photographs, neither of them gruesome nor more inflammatory than the

testimony of the eyewitnesses who observed the killing. We find no abuse of discretion by the trial court in admitting the photographs.

B. Sufficiency of the Evidence.

Peterson, who offered no evidence, attacks the sufficiency of the Commonwealth's evidence in two respects. First, he says the testimony of witnesses identifying him as the killer was too inconsistent to support his conviction. Second, he argues there was no evidence that the shooting was a willful, deliberate, and premeditated act. Considering the evidence in the light most favorable to the Commonwealth, we reject both contentions.

On brief, Peterson asserted that Wilson, Scott, and Thomas failed to identify him initially, that Wilson's identification was based upon Peterson's "hairline," and Scott's upon his "eyebrows and the fact that he was clean-shaven." But each of these witnesses positively identified Peterson. The uncontradicted evidence showed that the store was brightly lighted, that Peterson wore no mask, and that his face was plainly visible to the witnesses. Wilson identified Peterson from a photographic array four days after the crime, identified him again in two different lineups, and identified him at the preliminary hearing and at trial. Scott could not remember whether she made an identification from a photographic array, but a detective testified that she had identified Peterson in that manner. She also identified him in a lineup, at the preliminary hearing, and at trial. Thomas identified Peterson's picture from a photograph of a lineup, and identified him at the preliminary hearing and at trial. It was for the jury to determine the credibility of the witnesses and the weight of the evidence. There was ample evidence identifying Peterson as the criminal agent.

It was also a jury question whether the killing of Kauffman was willful, deliberate, and premeditated. The testimony of the three eyewitnesses was that Kauffman made no aggressive move towards Peterson but merely stood facing him in the office: Two of the witnesses said that Peterson had the money bag in his possession before he took out his gun and shot the victim. There was only one shot; the bullet was fired in a declining trajectory directly into Kauffman's midsection. To establish premeditation, the intention to kill need only exist for a moment. See Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975); Bradshaw v. Commonwealth, 174 Va. 391, 4 S.E.2d 752 (1939). There was evidence that Peterson had time after seizing the money bag to pull out his weapon and fire at Kauffman. There was evidence that Kauffman had tried to prevent Peterson from entering the office. The jury could reasonably infer that Peterson planned to commit armed robbery and to kill anyone who attempted to frustrate his purpose. The jury could reasonably conclude, therefore, that Peterson shot Kauffman to make certain that he would not attempt to impede the defendant's escape from the scene of the robbery. We hold the evidence was sufficient to support the jury's finding that the shooting was willful, deliberate, and premeditated.*

II. The Penalty Trial.

A. Procedural Questions Barred by Contemporaneous Objection Rule.

1. Time for conducting the penalty trial.

On appeal, Peterson for the first time complains that the trial court erred in proceeding almost immediately from the

*The jury also found Peterson guilty of armed robbery and use of a firearm in the commission of a felony; the trial court entered judgment on the verdicts. Those convictions are not challenged in the present appeal.

guilt trial to the penalty trial. No contemporaneous objection was made. Indeed, the trial judge informed the jury, without objection, at the conclusion of the guilt phase of the trial, that opposing counsel and the defendant were ready to proceed in approximately ten minutes if this was satisfactory with the jury. We will not now notice Peterson's objection. Rule 5:21.

2. Instruction No. 1A.

On appeal, Peterson for the first time objects to the granting of Instruction No. 1A, which informed the jury in the language of Code § 19.2-264.4(C) that the death sentence could be based on the vileness of the crime or the dangerousness of the defendant as those terms are explicated in the statute. Peterson states correctly that there was no evidence of vileness in the crime. A death sentence based upon vileness is not supported by the evidence where the victim died almost instantaneously from a single gunshot wound. Godfrey v. Georgia, 446 U.S. 420 (1980). But Peterson's counsel responded to the trial judge's inquiry at trial by stating affirmatively that he had no objection to the instruction. The Commonwealth did not argue vileness, and the jury based its verdict fixing punishment at death solely upon the finding that Peterson posed "a continuing serious threat" to society. We will not now notice this objection. Rule 5:21.

B. The Jury's Inquiry About Parole.

After retiring to fix Peterson's punishment, the jury returned to the courtroom and through its foreman asked the trial judge whether it was possible "to give a life sentence without parole." The judge replied as follows:

> The only response I can give you on that ... is that it's the function of the jury, duty of the jury, to impose such sentence as they consider just under the evidence and the instructions of the Court.
>
> And you should not concern yourself with what may thereafter happen. It may not be a very satisfactory answer, but it's the only one I can give you.

Peterson did not object to the answer. Rule 5:21. He concedes that under Clanton v. Commonwealth, 223 Va. 41, 54-55, 286 S.E.2d 172, 179-80 (1982), and Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978), the judge's response was correct. He argues, however, that Code § 53.1-151(B)(1), which became effective July 1, 1982, after Clanton and Hinton were decided and after the Kauffman killing, changed the law by making a person convicted of three separate offenses of armed robbery ineligible for parole. We need not consider the effect of this statutory amendment, because we rely upon and reaffirm the principle enunciated in Clanton and Hinton that it is improper to inform the jury as to the possibility of parole. For this reason, it would have been improper for the trial court sua sponte to have offered a jury instruction based upon the 1982 amendment, even if, as Peterson now contends, the amendment applied to him.

C. Evidence of Other Crimes.

Peterson contends that the trial court erred in admitting evidence of other crimes for which he had been convicted but which were then pending on appeal. Conceding that under Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972 (1980), evidence of prior convictions is admissible in the penalty trial, he says that such evidence should not be admissible where he has pleaded not guilty to the charges and has appealed the convictions. We disagree.

Appeal of a criminal conviction does not affect the finality of the judgment, it only suspends execution of the sentence. Code § 19.2-319; Hirschkop v. Commonwealth, 209 Va. 678, 166 S.E.2d 322, cert. denied, 396 U.S. 845 (1969). Moreover, the proceedings of the trial court are presumed to be correct unless and until they are reversed on appeal, and the pendency of an appeal does not preclude use of a conviction for impeachment purposes. See Bloch v. United States, 226 F.2d 185

(9th Cir. 1955), cert. denied, 350 U.S. 948 (1955), reh'g denied, 350 U.S. 977 (1956); United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.), cert. denied, 337 U.S. 959 (1949). See also Bloch v. United States, 238 F.2d 631 (9th Cir. 1956) (subsequent reversal of conviction used to impeach defendant at trial did not require new trial), cert. denied, 353 U.S. 959 (1957).

Code § 19.2-264.4 prescribes the evidence that may be admissible in the penalty trial of a capital murder case as including "the circumstances surrounding the offense, the history and background of the defendant," as well as mitigating evidence. Under this broad statutory language, it is clear that more than the mere police record of the defendant may be introduced. Evidence is made admissible that would not be admissible in the guilt trial. Thus, in Stamper, the testimony of the victim of an earlier crime of violence was properly admitted to show the dangerousness of the defendant in that case. 220 Va. at 275-77, 257 S.E.2d at 819-20. The statute does not restrict the admissible evidence to the record of convictions. In fairness to the defendant, however, the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty.

In the present case, the Commonwealth presented the testimony of two victims of armed robberies of which Peterson had been convicted. Sheila Coffey testified that she was robbed at gunpoint at a Revco store on January 15, 1982, by Peterson and an accomplice. She identified Peterson as the robber who held the gun on her. Garrie Anne Baize testified that she was working as a clerk at a Family Dollar store when she was robbed about 10:15 a.m. on February 8, 1982, the day after Kauffman was killed. She identified Peterson as the robber. Baize also related a threat made against her by Peterson at the conclusion of the preliminary hearing on the Family Dollar store charges against him. Her testimony was that as she was leaving the courtroom, Peterson, in handcuffs, told her, "I'll remember you,

and I'm going to get you, you [expletive deleted]."

In addition, Probation and Parole Officer Sharon Bonville testified to Peterson's record as a juvenile and as an adult, including the offenses which Coffey and Baize described. Peterson's juvenile record began in 1974 at age 12. In 1977, he was committed to juvenile detention for armed robbery. In 1979, when he was an adult, he was convicted of breaking and entering and grand larceny.

D. Sufficiency of the Evidence.

Peterson says the evidence was insufficient to support the jury's finding that he was a continuing serious threat to society and the trial court erred, therefore, in not striking this evidence. We reject this contention. There was ample evidence to support the jury's finding. Peterson's criminal record and his threat to harm a witness who testified against him in another case show an unmistakable proclivity for violence and an obvious unwillingness to abide by the laws of the land. Moreover, the jury could properly consider the capital murders itself in assessing the probability that Peterson would continue to commit acts of violence. Indeed, the only evidence to the contrary was the testimony of Peterson's mother that she had never known her son to be violent, had never seen him with a gun, and did not think he would commit other crimes if he were ever released.

E. Presentence Review by the Trial Court.

The report required by Code § 19.2-264.5 was prepared and filed with the trial court by Probation and Parole Officer Bonville. This statute authorizes the trial court, after considering the report, to set aside the sentence of death and impose a sentence of life imprisonment. A hearing was conducted by the court on September 24, 1982, at which Bonville and two other witnesses testified in mitigation of punishment. Bonville stated that during the nine months Peterson spent in custody as a juvenile he "progressed fairly well," and when he was released, the detention authorities "thought he was doing well." Bonville

thought that Peterson needed vocational training and behavioral counselling.

Ann D. Clark, a neighbor, testified that she had known Peterson since he was nine or ten. She had always found him to be friendly and courteous, had never seen him carrying a weapon, and had never observed any violent behavior on his part. She was not aware of his criminal record.

Peterson's mother testified that Peterson was six when she and her husband separated and Peterson was "somewhat" of a disciplinary problem when he was growing up. Stating that her son's attitude improved after his detention as a juvenile, she asked the court to permit him to be rehabilitated rather than executed.

Peterson says that his age, 21 years, was a mitigating circumstance requiring the trial court to set aside the death sentence. We agree with the Commonwealth that Peterson's age does not per se preclude imposition of the death sentence. Age was merely a fact to be weighed by the jury. Thus, in Giarratano v. Commonwealth, 220 Va. 1064, 1066, 266 S.E.2d 94, 95 (1980), the defendant upon whom the death sentence was imposed was age 21 when he was indicted. Peterson's argument is without merit.

At the same hearing, Peterson moved the court to set aside the death sentence because of certain after-discovered evidence upon which he had based a motion for a new trial on his Family Dollar conviction. On September 22, 1982, a hearing in that case was conducted on his motion and Peterson presented the testimony of two alibi witnesses. However, neither could say where Peterson was at the time of the Family Dollar robbery. The trial court, finding that the evidence would not have produced a different result, denied the motion. Nevertheless, Peterson argues that the jury in the present case should have had the benefit of the testimony of his alibi witnesses in the Family

Dollar case. The trial court disagreed and overruled the motion. We hold that the court did not err in this ruling. The proffered evidence was irrelevant; it did not qualify as after-discovered evidence in the present case. Moreover, it was found by the trial court not even to qualify as after-discovered evidence justifying a new trial in the Family Dollar case.

At the conclusion of the hearing on September 24, the trial court confirmed the jury verdict and sentenced Peterson to death. The trial judge stated, before imposing sentence, that the jury verdict was "fully justified and supported by the evidence," that the punishment fixed by the jury was just and appropriate, and that it was not reached by the jury "under the influence of passion, prejudice, or other arbitrary factors." We hold that the trial court discharged its obligation under Code § 19.2-264.5 and did not abuse its discretion in imposing the death sentence in accordance with the jury verdict.

III. Sentence Review.

It is our duty under the provisions of Code § 17-110.1 to determine whether the death sentence was imposed under the influence of "passion, prejudice or any other arbitrary factor" or is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

There is nothing in the record to suggest that the death sentence was imposed under any improper influence. Peterson relies upon the rulings of the trial court admitting the photographs of the victim, granting Instruction No. 1A, admitting the testimony of Baize that Peterson threatened her for testifying against him, and admitting evidence of Peterson's convictions of other crimes when those convictions were pending on appeal. We have heretofore demonstrated that Peterson's challenges to these rulings were without merit.

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As the record shows, Peterson was in constant difficulty with the juvenile authorities from an early age. As a juvenile he was committed to detention for armed robbery at age 15; as an adult he was convicted of breaking and entering and grand larceny. He was convicted of armed robbery and a related offense committed approximately three weeks before the shooting at the Pantry Pride store. He was convicted of armed robbery and a related offense committed the next day after the Kauffman slaying. He threatened a witness who testified against him. All this evidence, which the jury and the trial judge obviously accepted, showed Peterson to be a dangerous man who would probably commit other acts of violence if given any opportunity to do so. Accordingly, we hold that the death sentence was not influenced by any arbitrary factors.

If juries generally in this jurisdiction impose the death sentence for conduct similar to that of the defendant then the sentence is not excessive or disproportionate. Quintana v. Commonwealth, 224 Va. 127, 151-52, 295 S.E.2d 643, 655-56 (1982), cert. denied, U.S. (1983); Giarratano v. Commonwealth, 220 Va. 1064, 1079, 266 S.E.2d 94, 103 (1980); Stamper v. Commonwealth, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), cert. denied, 445 U.S. 972 (1980). Accordingly, we have examined the records in all capital-murder cases reviewed by this Court, with particular emphasis given those cases in which the death sentences were based upon the probability that the defendants would be continuing threats to society. Thus, in Stamper, where the defendant was convicted of murdering three victims during the commission of armed robbery, two of the death sentences were based solely upon his proclivity for violence. Except for the of multiple murders for which he was then being sentenced, his only previous conviction of a violent crime was for armed robbery. 220 Va. at 277, 257 S.E.2d at 820. In Evans v. Commonwealth, 222 Va. 766, 779, 284 S.E.2d 816, 823 (1981), cert. denied,

455 U.S. 1038 (1982), the defendant had previously been convicted of several assaults but had received a substantial prison sentence only for the most recent offense — assault with a deadly weapon inflicting serious injuries. In Bassett v. Commonwealth, 222 Va. 844, 850, 284 S.E.2d 844, 849 (1981), cert. denied, 456 U.S. 938 (1982), the defendant had previously been convicted of unlawful wounding, statutory burglary, escape, and armed robbery. The death sentence in Giarratano was based on dangerousness of the defendant although the capital murder (rape-murder of a juvenile) was unusually horrible and was followed by the murder of the victim's mother to prevent her from reporting the crime. The defendant had previously been convicted of many drug offenses and several assaults but no major crimes of violence. 220 Va. at 1075-76, 1078-79, 266 S.E.2d at 101, 103.

We have also affirmed the imposition of death sentences based upon both vileness of the capital murders and dangerousness of the defendants. In Clanton, for example, the defendant had previously been convicted of murder and of unlawful wounding. 223 Va. at 49, 286 S.E.2d at 176. There was evidence in Quintana of the defendant's plotting to take hostages and to commit other acts of violence. 224 Va. at 147, 295 S.E.2d at 653. In Turner v. Commonwealth, 221 Va. 513, 525 n.11, 273 S.E.2d 36, 44 n.11 (1980), cert. denied, 451 U.S. 1011 (1981), the defendant had previously been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder. The defendant in James Dyral Briley v. Commonwealth, 221 Va. 563, 578, 273 S.E.2d 57, 66 (1980), had previously been convicted of armed robbery and attempted murder. In Linwood Earl Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980), cert. denied, 451 U.S. 1031 (1981), the atrociousness of the capital murder was so great that the previous record of the defendant was irrelevant to a determination that he would be a public menace.

From our examination of the record, and our comparison of Peterson's record and history with those of other defendants in capital-murder cases, we conclude that juries generally in this jurisdiction impose the death sentence for conduct similar to that of Peterson. The sentence imposed in this case, therefore, is not excessive or disproportionate.

We hold that the trial court committed no error in either the guilt or the penalty trial and we further hold, based on our independent review, that the sentence of death was properly imposed. Accordingly, we will affirm the judgment.

Affirmed.

Amendment V, Constitution of the United States

No person shall be held to answer for a capital, or otherwise imfamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII, Constitution of the United States

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Va. Code §17-110.1

A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

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1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument.

Va. Code §18.2-31(d)

The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon.

Va. Code §18.2-10(a)

For Class 1 felonies, death, or imprisonment for life.

Va. Code §19.2-264.2

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Va. Code §19.2-264.3

A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding

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before the same jury shall be held as soon as practicable on the issue of the penalty, which shall be fixed as is provided in §19.2-264.4.

Va. Code §19.2-264.4

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of §19.2-299, or under any Rule of Court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed.....foreman"

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(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed.....foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

Va. §19.2-264.5

When the punishment for any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in §19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1982, TERM

NO. 82-6990

DERICK LYNN PETERSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Since the time the Petitioner, Derick Peterson, filed his Petition for a Writ of Certiorari, this Court announced opinions dealing with, or impacting on, the issues raised in the Petition, Zant v. Stephens, _____ U.S. _____, 51 U.S.L.W. 4891; California v. Ramos, _____ U.S. _____, 51 U.S.L.W. 5220; Solem v. Helm, _____ U.S. _____, 51 U.S.L.W. 5019. Pursuant to Rule 22.6, Rules of the Supreme Court, this Supplemental Brief is being filed to discuss those decisions and how they affect the issues now pending before the Court in this case. The topics will be discussed in the same order as in the Petition for a Writ of Certiorari.

A. THE TRIAL COURT, BY REFUSING TO RESPOND TO THE JURY'S QUESTION ABOUT THE POSSIBILITY OF A LIFE SENTENCE WITHOUT PAROLE FOR PETITIONER'S CAPITAL MURDER, RESTRICTED THE JURY'S CONSIDERATION OF ANY FACTOR IN MITIGATION OF THE DEATH SENTENCE, AS REQUIRED BY LOCKETT v. OHIO.

On July 6, 1983, this Court decided California v. Ramos, supra, in which it was held that the Eighth and Fourteenth Amendments of the United States Constitution did not prohibit the State of California from requiring that juries in capital cases

be instructed that the governor has the power to commute a life sentence. This Court noted that life imprisonment without the possibility of parole was a sentencing option which the jury had and of which they were told, and the instruction merely gave them accurate information to dispel any "possible misunderstanding" about that sentencing alternative, id. at 5224, fn. 19. The Court again cited with approval Gregg v. Georgia, 428 U.S. 153, 204 (1976): "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision," California v. Ramos, 51 U.S.L.W. at 5225, fn. 23. The same concern pervades this Court's opinion in Zant v. Stephens, supra.

As was pointed out in the Petition, Virginia Code §53.1-151 provides that a defendant receiving, for the first time, a single life sentence is not eligible for parole until after serving fifteen years and that a defendant receiving two or more life sentences is not eligible for parole until after serving twenty years. Peterson's counsel argued that the jury should have been told that Peterson, by virtue of having received three life sentences for three separate and distinct crimes, could in fact have gotten life imprisonment without the possibility of parole pursuant to a change in Virginia Code §53.1-151 effective after the date Peterson committed the capital murder which is the subject of the Petition and this Supplemental Brief and other crimes. Before the Virginia Supreme Court, the Commonwealth argued that a sentence of life imprisonment without the possibility of parole based upon a crime committed prior to the date the statute authorizing such a punishment was effective would violate the Constitution's ex post facto clause, Brief of Appellee, pp. 8ff. Even asssuming that the Commonwealth is correct, the jury could nonetheless have been told about the

minimum time Petitioner would be incarcerated before he would be eligible for parole.

If California may require juries to be told about the possibility of commutation of a sentence of life imprisonment by the governor, with the "wide-ranging evidence" which this Court has endorsed in capital sentencing proceedings, the much firmer prospect of Peterson's incarceration for a considerable period of years should have been brought to the attention of the jury. Indeed, California v. Ramos, says so, id. at 5224, fn. 19:

> ....Further, the defendant may offer evidence or argument regarding the commutation power....

That the jury should have been informed of the long length of time that would elapse before Petitioner would be eligible for parole is also buttressed by this Court's reasoning in California v. Ramos that consideration of a life sentence involves jury consideration of a defendant's future dangerousness. It was solely upon the Petitioner's future dangerousness as perceived by the jury that that body recommended a death sentence. Proper jury information about the true consequences of a life sentence therefore became even more critical in the protection of Petitioner's Constitutional rights.

Further, California v. Ramos evidences this Court's concern that the information a jury receive in the course of a capital sentencing procedure be full, accurate and not misleading. The information the jury received was certainly not full and, indeed, did nothing to eliminate the jury's likely misconception that the Petitioner would be paroled within a relatively short period of time. In this sense, the information the jury received --or, more accurately, did not receive -- failed to dispel the misunderstanding which causes this issue to arise, in this and other cases. Obviously, the jury was considering a life sentence

for Petitioner on his capital murder conviction, and might well have given him such a sentence if they had been adequately instructed on the true effects of parole on a life sentence.

However, to rule that Petitioner is entitled that the jury be informed as he here argues does not require this Court to rule that the prosecution might offer such evidence or the conditions under which it might do so. It is only necessary to rule that Petitioner has the right to have the jury so informed on the basis of the clear authority of Lockett v. Ohio, 438 U.S. 586, (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

There is a conceptual difference, recognized in California v. Ramos, between a state's offer of evidence during a capital sentencing proceeding and what a defendant may choose to offer under Lockett and Eddings, supra. That a defendant may offer evidence and/or argument regarding parole is made clear from that portion of fn. 19 of California v. Ramos, quoted above and also the portion of the same footnote which follows:

> We note further that respondent (Ramos) does not, and indeed could not, contend that the California sentencing scheme violates the directive of Lockett of Ohio, 438 U.S. 586 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case. (Citation to California Penal Code omitted)

The Commonwealth, relying on California v. Ramos, contends that state law, not federal Constitutional law, governs the questions of whether and to what extent juries should be allowed to consider commutation or parole (Brief in Opposition to Petition, p.8). The Petitioner disagrees: in the circumstances of this case it is a Lockett question.

8. THE TRIAL COURT, IN ADMITTING INTO EVIDENCE A REMARK MADE BY A WITNESS FOR THE COMMONWEALTH ALLEGEDLY MADE TO HER BY THE PETITIONER AT A PRELIMINARY HEARING ON ANOTHER CHARGE, VIOLATED PETITIONER'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO HAVE THE JURY FIX HIS SENTENCE IN LIGHT OF CLEAR, ASCERTAINABLE STANDARDS.

During the penalty phase of Petitioner's trial, the Commonwealth introduced Gerrie Anne Baize, an employee of Family Dollar Stores in Hampton, Virginia. She testified to a robbery committed by Petitioner which occurred February 8, 1982, the day after the incident which resulted in Petitioner's capital murder conviction. She testified, among other matters, that at the preliminary hearing arising out of the February 8, 1982, incident, Petitioner told her after she testified against him "I will remember you, and I'm going to get you, you mother fucker".

Zant v. Stephens, supra, might be seen as supporting the Commonwealth's argument that such evidence was properly admitted, but only if this Court should construe Zant as standing for the proposition that any evidence, no matter of what kind or nature, should be admitted during the sentencing phase of a capital trial if it relates to the crime or the defendant. That this is not the case, and that Zant has some limitations, is evident from its citation of Gregg v. Georgia, supra at 203-204, where it was declared that "the evidence introduced and the arguments made at the presentence hearing (should) not prejudice a defendant," Zant, supra at 4897.

It is one thing to admit evidence, wide ranging though it may be, pertaining to the crime for which a jury is deliberating on a death sentence or touching objective, measurable symptoms of a defendant's future dangerousness. It is quite another to admit angry words. In the first place, everybody at one time or another has utilized harsh words. Secondly, no evidence was offered by the Commonwealth -- and, indeed, the Commonwealth did

not even attempt to offer -- any evidence to show a correlation, if any correlation exists, between such harsh words and Petitioner's supposed penchant for future violence. Further, Peterson's jury was not instructed as to what weight to give such evidence or what otherwise to make of it. It was more prejudicial than probative.

C. THE VIRGINIA SUPREME COURT, IN CONDUCTING A PROPORTIONALITY REVIEW OF PETITIONER'S DEATH SENTENCE, UNCONSTITUTIONALLY RESTRICTS ITS REVIEW TO CASES IN WHICH THE DEATH PENALTY IS ACTUALLY IMPOSED.

There is now pending before this Court Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), cert. granted 51 U.S.L.W. 3684 (1983). The questions which this Court will consider in Harris are, in essence:

> 1. Does the Constitution, in addition to procedures whereby the trial court or jury impose the death sentence, require any specific form of proportionality review, by a court of statewide jurisdiction prior to execution of a state death judgment?
>
> 2. If so, what is the Constitutionally required focus, scope and procedural structure of such review?

The importance of proportionality review was emphasized in Zant v. Stephens, supra at 4898, where this Court noted that:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality....

It was further noted that the proportionality review conducted by the Georgia Supreme Court encompassed not only cases in which the death penalty was imposed, but similar cases in which death was not imposed, id. at 4895, fn. 19.

Petitioner contends that in his case the Virginia Supreme

Court reviewed only cases in which the death penalty was imposed, and not other cases in which a defendant may have been charged with capital murder but received only a life sentence. The Commonwealth contends at page 11 of its Brief in Opposition that the Virginia Supreme Court does not restrict its review to only those cases in which the death penalty has been imposed. To agree with the Commonwealth is to read into the opinion of the Virginia Supreme Court in Petitioner's case, pp. 12-14, something which is not there. The only cases which are compared with Peterson's are those in which the death sentence was imposed. There is no statement in the opinion by the Virginia Supreme Court from which this Court can reasonably conclude that the Virginia Supreme Court considered cases other than those in which the death penalty had been imposed.

The Virginia Supreme Court has occasionally compared death sentences with capital murders in which the death sentence was not imposed. When it has done so, it has said so, and its failure to say so in the Peterson opinion leads one to the inescapable conclusion that the Court relied only on capital murder cases in which death sentences were imposed to support the death sentence for Peterson. Thus, in Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808, cert. den., 445 U.S. 972 (1979), the Court compared Stamper's conduct with that of a co-defendant. The same was true in Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979) cert. den., 444 U.S. 1103.

With the exception of Stamper, in none of the cases relied on by the Virginia Supreme Court to uphold the death sentence in this case is there any indication that the Court compared other cases involving capital murders in which the death sentence was not imposed. Evans v. Commonwealth, 222 Va. 766, 284 S.E.2d 816 (1981), cert. den. 455 U.S. 1038 (1982); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. den.,

456 U.S. 938 (1982); Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. den. 451 U.S. 1011; James Dryal Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Linwood Earl Briley v. Commonealth, 221 Va. 532, 273 S.E.2d 48 (1980), cert. den. 451 U.S. 1031 (1981); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. den., _____ U.S. _____, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983). It is interesting that in Turner, 273 S.E.2d at 47, the Court noted that it examined the capital murder cases it had "reviewed" since Virginia Code §17-110.1(c) was enacted, focusing on cases in which death sentences had been imposed for murder in the commission of a robbery. Virginia Code §17-110.1(c) provides for automatic review by the Virginia Supreme Court of cases in which the death penalty has been imposed. In Evans, supra, a capital murder arising out of the killing of a law enforcement officer, the Court admitted it had no comparable case to determine whether or not Evans' death sentence was excessive or disproportionate, and looked instead to cases which made the death penalty mandatory for the killing of a law enforcement officer or which involved death sentences imposed for the killing of such an officer.

LeVasseur v. Commonwealth, 225 Va. _____, 304 S.E.2d 644 (1983), a case recently decided by the Virginia Supreme Court, shows that this trend continues. The Court noted it had examined the records "in all the capital murder cases reviewed by this Court, taking particular note of the facts in which juries imposed capital punishment solely on the basis of the 'vileness' predicate" (that being the aggravating circumstance on which the jury recommended the death sentence).

Virginia Code §17-110.1(c) does not require the Supreme

Court to accumulate records of capital felonies, but says it "may" accumulate such records within such period of time as it may determine and shall consider such records "as are available" in determining whether the sentence under review is excessive. It is obvious this imposes no real duty on the Virginia Supreme Court.

After this Court's decision in Solem v. Helm, supra, it is apparent that the Virginia Supreme Court's proportionality review is defective in another respect. The Virginia Supreme Court, in deciding whether a death sentence in any particular case is excessive or disproportionate, considers only cases tried in the Commonwealth of Virginia. In Solem, supra at 5023, this Court declared not only that a court in conducting its proportionality analysis, could, but should, review "the sentences imposed for commission of the same crime in other jurisdictions." If such a proportionality analysis ought to be conducted in cases involving only imprisonment, it ought doubly to be conducted when a defendant's life is at stake. Cases involving convictions of capital murder when either death or lesser authorized punishments are imposed form a relatively narrow class. The aggravating circumstances which make a defendant eligible for the death penalty will be, on a nationwide basis, relatively few and, at the same time, will be similar from state to state. There is a tendency of states to borrow capital punishment statutes from other states (such as Virginia did after the capital punishment procedures in Georgia and Texas were upheld by this Court in Gregg v. Georgia, supra, and Jurek v. Texas, 428 U.S. 262 [1976]). For these reasons, appellate review of capital murder cases in other states, both those in which death is imposed and those in which it is not, is particularly appropriate.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari heretofore filed, Petitioner prays that this Court issue a writ of certiorari.

DERICK LYNN PETERSON

By _____
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing to Richard B. Smith, Assistant Attorney General, Criminal Law Enforcement Division, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia, 23219, Counsel for Appellee, this 16 th day of September, 1983.

_____
J. Gray Lawrence, Jr.

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NO. 82-6990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DERICK LYNN PETERSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

GERALD L. BALILES
Attorney General of Virginia

RICHARD B. SMITH
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Supreme Court Building
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Richmond, Virginia 23219

QUESTIONS PRESENTED

A. Did the trial court's refusal to answer the jury's question concerning the possibility of future parole impermissibly restrict the consideration of mitigating factors?

B. Was the trial court's admission of a threat made by the petitioner to one of his victims violative of the petitioner's constitutional rights?

C. Was the trial court's admission of evidence relating to certain of petitioner's previous convictions pending on appeal violative of petitioner's constitutional rights?

D. Did the Virginia Supreme Court unconstitutionally restrict its proportionality review of petitioner's death sentence by only reviewing cases in which the death penalty was actually imposed?

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IN THE

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Commonwealth of Virginia, the respondent herein, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia entered in this case on April 29, 1983, not be granted.

For purposes of uniformity, the parties will hereinafter be referred to as the petitioner and the Commonwealth, and all page references will be to the Joint Appendix filed in the Supreme Court of Virginia by the petitioner and the Commonwealth and designated (App. ___), and to the Respondent's Appendix filed herewith and designated (Resp. App. ___).

OPINION BELOW

The opinion of the Supreme Court of Virginia affirming the judgment of the Circuit Court for the City of Hampton was

rendered on April 29, 1983, and is reported as 225 Va. ___, 302 S.E.2d 520 (1983).

JURISDICTION

The petitioner claims that jurisdiction is founded upon Rule 17.1(c) of the Rules of this Court.

STATEMENT OF THE CASE

The trial of this case came to be heard in the Circuit Court for the City of Hampton, Virginia, upon an indictment charging the petitioner with capital murder during the commission of a robbery, while armed with a deadly weapon, in violation of § 18.2-31 of the Code of Virginia.

At the trial, Dwight Wilson testified that he was an employee of the Pantry Pride supermarket on Pembroke Avenue in the City of Hampton on February 7, 1982. At approximately 6:00 p.m., as he was working as a cashier some twenty-five feet from the store's office, Wilson observed the petitioner force his way into the office where Howard Kauffman, the store's accountant, was preparing the day's bank deposit. (App. 32-38.)

The petitioner grabbed a bank deposit bag from the desk where Kauffman was working. Kauffman retreated across the office, but the petitioner produced a gun and shot him in the abdomen. The petitioner then ran from the store. (App. 38-42.)

Wilson further testified that the store was brightly lit, and he saw the petitioner's face because he was not wearing a disguise. Nothing impeded Wilson's view of the shooting, and he was certain of his identification. (App. 39-43.)

Four days later, Wilson was shown a group of photographs by the police. He selected the petitioner's picture from the array and, the next day, he picked the petitioner out of two different line-ups. Wilson also identified the petitioner at the preliminary hearing and at trial as the man who shot and robbed Howard Kauffman. (App. 45-46.)

Wanda Scott testified that she was also working as a cashier at the store when Kauffman was shot. She was stationed at the register next closest to the office, and she saw the petitioner force his way in. After petitioner entered the office, Scott saw him grab something and shoot Kauffman. Nothing blocked her view of the shooting, and the petitioner was not disguised. (App. 55-57.)

Scott did not remember what she told the police after viewing a photographic array (App. 58), but Detective Edgar Browning testified that she had picked out the petitioner's picture. (Supp. App. 1.) She also identified the petitioner from a lineup, at the preliminary hearing and at trial. (App. 59.)

Another employee of the Pantry Pride store, Donald Thomas, was also working the night Kauffman was killed. He was standing about five feet from the petitioner when Kauffman was shot. Thomas selected the petitioner's picture from a photographic lineup and identified him at the preliminary hearing and at trial as the man who shot Kauffman with a large black gun. (App. 65-68.)

Three patrons of the Pantry Pride store also testified at the petitioner's trial. Robin Barlow and John Chavas saw the petitioner peering into the supermarket just prior to the shooting and saw him run from the scene with a gun in his hand afterwards. (App. 88-90, 98-100.)

Jean Sarver stated that a white vehicle forced her off the road as she approached the store directly after the shooting. The vehicle was driven by the petitioner, who she identified at a lineup and at trial. It was traveling at a high rate of speed. (App. 80-87.)

An autopsy was performed on Howard Kauffman's body after the shooting. The cause of death was found to be a single gunshot wound to the abdomen which severed the illiac artery causing a great amount of blood loss. (App. 106-109.)

The day after the shooting and robbery, an audit of the Pantry Pride's books was done. A deposit bag containing $6,005.02 -- $2,025.32 in checks and $3,979.70 in cash -- was found to be missing. (App. 110-114.)

No evidence was presented on the petitioner's behalf (App. 125), and the jury found him guilty of capital murder as charged in the indictment. He was also found guilty of using a firearm illegally and of robbery. (App. 126, 1, 3.)

Subsequent to the petitioner being found guilty of capital murder, the punishment stage of his trial commenced. During this phase of the trial, the Commonwealth presented three witnesses.

Two of the witnesses, Sheila Coffey and Garrie Anne Baize, were victims of other robberies committed by petitioner and they described those incidents. (App. 130-138.) Baize also stated that, after testifying against the petitioner at the preliminary hearing in her case, the petitioner told her: "I'll remember you, and I'm going to get you, you mother fucker." (App. 139.)

The third witness was Sharon Bonville, a probation officer, who gave the petitioner's prior record. It included

attempted armed robbery and robbery as a juvenile and breaking and entering, grand larceny, and robbery at a Revco Drug Store as an adult. He had also been convicted of robbing an employee of a Family Dollar store, but had not been sentenced at the time of the trial herein. (App. 140-144.)

The petitioner's mother was the only witness who testified on his behalf during the penalty stage of the trial. She stated that the petitioner was twenty-one years old. He had a son and a daughter, and she had never seen him take any drugs. She had never known him to have a gun, and she did not believe him to be a violent person. (App. 150-154.)

After being instructed on the law with respect to the petitioner's punishment, the jury found that there was a probability that he would commit criminal acts of violence in the future and would constitute a continuing serious threat to society. His sentence was then unanimously fixed at death. (App. 157.)

A pre-sentence report was prepared and considered by the trial court pursuant to Virginia Code § 19.2-264.5. The trial court refused to set aside the jury's verdict and, on September 24, 1982, sentenced the petitioner to death pursuant to Virginia Code § 18.2-10.

Petitioner then appealed his conviction and death sentence to the Supreme Court of Virginia, which accorded his case priority status. On April 29, 1983, the Supreme Court of Virginia affirmed petitioner's conviction and held that the penalty imposed was neither excessive nor disproportionate.

ARGUMENT

A. THE TRIAL COURT'S REFUSAL TO ANSWER THE JURYS' QUESTION CONCERNING THE POSSIBILITY OF FUTURE PAROLE DID NOT IMPERMISSIBLY RESTRICT THE CONSIDERATION OF MITIGATING FACTORS.

Petitioner points out that this Court concluded in Lockett v. Ohio, 438 U.S. 586 (1978), that "any aspect of a defendant's character or record and any of the circumstances of the offense" should be considered by the jury as a factor in mitigation of the death penalty. Petitioner fails to note, however, that this general statement was qualified by the following notation:

> Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense.

Id. at 604, n.12.

Here, petitioner complains that he was denied the right to present mitigating evidence when the trial judge responded as follows to the jury foreman's question whether or not it was possible to give a life sentence without parole:

> The only response I can give you on that, Mrs. Buckingham, is that it's the function of the jury, duty of the jury, to impose such a sentence as they consider just under the evidence and the instructions of the court. And you should not concern yourself with what may thereafter happen. It may not be a very satisfactory answer, but its the only one I can give you. (App. 156.)

And the Supreme Court of Virginia held this is to be a correct statement of Virginia law, whether in a capital case or otherwise.

Virginia Code § 19.2-264.4B specifies certain factors which may be considered in mitigation of sentence, but does not limit the jury to just these criteria. The Commonwealth submits, however, that petitioner's possible parole eligibility was irrelevant to his "character, prior record" or the

"circumstances of his offense" and was thus not a legitimate mitigating factor. Moreover, there are sound reasons for not allowing the introduction of such evidence. See Hinton v. Commonwealth, 219 Va. 492, 495, 247 S.E.2d 704 (1978).

Here, petitioner asserts that the jury had the right to know that "a single life sentence meant that the defendant would not be eligible for parole until after serving fifteen years and that persons convicted of two or more life sentence[s] would not be eligible for parole until after serving twenty years."[1] (Petitioner's Petition.) But, since the jury specifically questioned whether petitioner could receive a life sentence without parole, it is incomprehensible that telling them that he could be back on the street in 20 years would have caused them to opt for life imprisonment.

If the jury could have been told that petitioner would not be eligible for parole for 20 years, then it would have only been fair to tell them about the Virginia "good time" laws which can make a prisoner with two life sentences eligible for parole in a much shorter period. See Code § 53.1-198, et seq. Indeed, the logical extension of such an instruction would be to point out to the jury that a defendant might escape at any time.

Finally, questions of parole are inconsistent with the fact that the safety of other prison inmates are also to be considered: "It was not beyond the bounds of propriety...for the prosecutor to suggest that [a capital murderer] might kill an inmate if he were sentenced to life imprisonment."

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[1]On appeal to the Virginia Supreme Court, petitioner claimed the jury should have been told that petitioner would never have been eligible for parole.

Clanton v. Commonwealth, 223 Va. 41, 54, 286 S.E.2d 172 (1982).

It is respectfully submitted, therefore, that the question of future parole is not a legitimate mitigating factor. If anything, the use of such evidence would do far more harm to a capital defendant's chances of avoiding the death penalty than good.

In any event, it is a matter of State law, not involving a federal constitutional question: "[T]he wisdom of the decision to permit juror consideration of possible commutation [or parole] is best left to the States." California v. Ramos, ___ U.S. ___, 33 Cr.L. 3306, No. 81-1893 (July 6, 1983).

B. THE TRIAL COURT'S ADMISSION OF A THREAT MADE BY THE PETITIONER TO ONE OF HIS VICTIMS WAS NOT VIOLATIVE OF THE PETITIONER'S CONSTITUTIONAL RIGHTS.

Virginia Code § 19.2-264.4B allows the introduction in the penalty phase of evidence relevant to sentencing, including the history and background of the defendant. Such evidence is still subject to the rules of evidence governing admissibility. Not only is the use of such evidence not completely unfettered as petitioner suggests, the evidence he complains of was clearly relevant to ascertain the likelihood of future violence.

After Garrie Ann Baize, one of the petitioner's prior robbery victims, testified against him at his preliminary hearing for the robbery of the Family Dollar store on February 8, 1982, the petitioner told her: "I'll remember you, and I'm going to get you, you mother fucker." (App. 139.) The petitioner now complains that evidence of this statement introduced during the penalty phase of his capital

murder trial should have been stricken because the statute allows the jury too much discretion. It is noted, however, that this evidence was not objected to at trial. It cannot now be raised in a federal forum. See Wainwright v. Sykes, 433 U.S. 72 (1977).

Nevertheless, without conceding that this issue is properly before this Court, the Commonwealth submits that the testimony was relevant and admissible under Code § 19.2-264.4. Part C of that statute provides, in part, that the death penalty shall not be imposed unless the Commonwealth proves beyond a reasonable doubt that there is a "probability based upon evidence of the prior history of the defendant... that he would commit criminal acts of violence that would constitute a continuing serious threat to society...." (Emphasis added.) It is the duty of the jury to consider all evidence relevant to sentencing, both good and bad, before finding that a defendant has a propensity to violence making him a societal menace. Stamper v. Commonwealth, 220 Va. 260, 276, 257 S.E.2d 808, cert. denied, 445 U.S. 972 (1979).

The mere record of a defendant's previous convictions may give the jury an inaccurate or incomplete impression of his disposition or temperament. Id. at 276. And it is submitted that the vulgar threat petitioner made to Ms. Baize was relevant to a consideration of his history and background: Not only did his threat show a complete lack of remorse or regret for the crime he had committed against her,[2] what could be more relevant to determining his provity to violence than his own promise that he still

---

[2]Such lack of regret or remorse is "obviously proper testimony for a jury to consider in determining whether such person would in all probability commit criminal acts of violence in the future." Clark v. Commonwealth, 220 Va. 201, 210, 257 S.E.2d 784, cert. denied, 444 U.S. 1049 (1979).

intended to commit future acts of violence against a former victim.

The sentencing discretion of juries in capital cases is not uncontrolled in Virginia. This evidence was legitimate and relevant.

C. THE TRIAL COURT'S ADMISSION OF EVIDENCE RELATING TO CERTAIN OF PETITIONER'S PREVIOUS CONVICTIONS PENDING ON APPEAL DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner complains that two previous convictions for robbing employees of a Family Dollar Store and a Revco Drug Store should not have been used during the penalty phase to show his prior record because they were pending on appeal at the time of his capital murder trial. However, under Virginia law, the pendency of an appeal merely postpones the execution of sentence. Virginia Code § 19.2-319; Rule 1:1 of the Rules of the Supreme Court of Virginia. And the postponement of the execution of sentence in a criminal case for purposes of appeal does not affect the finality of judgment. Hirschkop v. Commonwealth, 209 Va. 678, 166 S.E.2d 322, cert. denied, 396 U.S. 845 (1969).

Moreover, trial proceedings are presumed to be correct unless and until they are reversed on appeal. For example, the pendency of an appeal does not preclude use of a conviction for impeachment purposes. See Block v. United States, 226 F.2d 185 (9th Cir. 1955), cert. denied, 350 U.S. 948 (1955), reh'g denied, 350 U.S. 977 (1956).

Finally, the Commonwealth notes that on April 21, 1983, the Supreme Court of Virginia found that there was no reversible error in the two judgments in question and therefore refused the petitions for appeal filed thereto.

(Resp. App. at 1-2.) These refusals were findings on the merits of the cases. Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974).

D. THE VIRGINIA SUPREME COURT'S PROPORTIONALITY REVIEW OF PETITIONER'S DEATH SENTENCE WAS PROPER.

Without conceding that it would be unconstitutional for the Virginia Supreme Court to only consider cases in which the death penalty is actually imposed in conducting its proportionality review of a defendant's death sentence, the Commonwealth points out that the Supreme Court of Virginia does not so restrict its review. In its written opinion in the instant case, the Virginia Supreme Court stated:

> From our examination of the record, and our comparison of Peterson's record and history with those of other defendants in capital-murder cases, we conclude that juries generally in this jurisdiction impose the death penalty for conduct similar to that of Peterson.

And the "capital-murder cases" referred to include both the ones in which the death penalty was meted out and the ones in which the defendants received life sentences:

> In order to guard against arbitrary, capricious, and discriminatory imposition of the death penalty, Code § 17-110.1C2, E, requires that we compare the case under review with "similar cases" and, in aid of that comparison, to "accumulate the records of all capital felony cases..as a guide in determining whether the sentence imposed in the case under review is excessive." In the first case decided after the effective date of that statute, we entered an order directing the Clerk of this Court to comply with the legislative directive. See Smith v. Commonwealth, 219 Va. at 482, n.8, 248 S.E.2d at 151. The Clerk has done so. All capital murder cases, including not only those in which the death penalty was imposed and reviewed by this Court but also those in which the jury or trial judge imposed a life sentence and the defendant petitioned this Court for appeal of his conviction, have been inventoried and indexed apart from other criminal cases.

Whitley v. Commonwealth, 223 Va. 66, 81, 286 S.E.2d 162, cert. denied, ___ U.S. ___, 103 S.Ct. 181 (1983).

CONCLUSION

For the reasons presented, the Commonwealth of Virginia, the respondent herein, respectfully contends that the issues raised in this case deal with matters of State law and/or are neither important nor substantial and that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

GERALD L. BALILES
Attorney General of Virginia

Richard B. Smith

RICHARD B. SMITH
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that I, Richard B. Smith, Assistant Attorney General of Virginia, am a member of the Bar of this Court, and that on this 25th day of July, 1983, mailed, with first class postage prepaid, three copies of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI to J. Gray Lawrence, Esquire, One East Plume Street, P. O. Box 3688, Norfolk, Virginia 23514, Counsel for petitioner.

Richard B. Smith

Richard B. Smith
Assistant Attorney General

RESPONDENT'S APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 21st *day of* April, 1983.

Derick Lynn Peterson, Appellant,

against Record No. 822075

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Hampton

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgments complained of. Accordingly, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee	$350.00 plus his costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 21st *day of* April, 1983.

Derick Lynn Peterson, Appellant,

against Record No. 822012

Commonwe lth of Virginia, Appellee.

From the Circuit Court of the City of Hampton

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgments complained of. Accordingly, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee	$350.00 plus his costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk